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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent, **A146053**

v. **(Contra Costa County Super. Ct. No. 051505551)**

MOISES FERNANDO TURCIOS,

Defendant and Appellant.

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A jury convicted appellant Moises Fernando Turcios of operating a chop shop (Veh. Code, § 10801),[1] unlawfully driving or taking a vehicle (§ 10851, subd. (a)), and two counts of receiving a stolen motor vehicle (Pen. Code, § 496d). The court sentenced Turcios to a five-year prison term and imposed various fines and fees, including a probation report fee (Pen. Code, § 1203.1).

Turcios appeals. He contends his chop shop conviction must be reversed because: (1) the instruction on the offense, CALCRIM No. 1752, misstates the law; (2) substantial evidence does not support the conviction; (3) the prosecutor urged the jury to convict on a "legally inadequate theory"; and (4) the court failed to instruct the jury on the lesser included offense of possessing stolen property (Pen. Code, § 496, subd. (a)). Turcios also

[1] All undesignated statutory references are to the Vehicle Code.

claims trial counsel rendered ineffective assistance by failing to object to the imposition of the probation report fee (Pen. Code, § 1203.1b).

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Charges

The People charged Turcios with operating a chop shop (§ 10801); unlawfully driving and taking a 4-Runner Toyota belonging to Christopher M. (Christopher) (§ 10851, subd. (a)); and three counts of receiving a stolen motor vehicle (Pen. Code, § 496d). The information alleged numerous similar charges against Daniel Lee Breton and a third defendant. The prosecution's theory was Turcios aided and abetted Breton and others in the operation of a chop shop at Castro Point, an abandoned ferry depot in Richmond.

Prosecution Evidence

A. Turcios Steals Cars, and Drives and Dismantles Them

On October 30, 2014, Christian R.'s Nissan truck was stolen. UC Berkeley informed him the truck had been found. The truck's stereo was missing and the contents of the glove compartment were scattered "all over the place." On October 30, 2014, Christopher's Toyota 4-Runner was stolen from a UC Berkeley parking garage. The police found the vehicle and returned it to Christopher, but it was inoperable. The ignition "had been swapped out," the "tailgate was smashed," the floorboard had been cut out, and the car was full of water. UC Berkeley security cameras recorded a Hispanic male driving the truck and the 4-Runner and the university made a flyer with the driver's picture. An El Cerrito police officer saw Turcios; thinking Turcios resembled the man on the flyer, the officer stopped Turcios and showed him the flyer. Turcios responded, "'That's me.'"

On October 22, 2014, a Richmond police officer found Turcios driving a stolen Toyota Camry. There was a screwdriver in the glove compartment and the key ring in the ignition had several car keys. The "whole front compartment of the car was missing. Wires [were] sticking out."

In February 2015, Alan S.'s (Alan) Toyota Camry was stolen. A few days later, a Richmond police officer found Turcios underneath the stolen Camry, "doing something with the engine[.]" Turcios had a backpack with tools, and "shaved metal pieces . . . commonly used to steal or break into vehicles." Turcios claimed the car belonged to "his friend, Daniel [Breton]." The Camry was eventually returned to Alan, but its "ignition system had been pried out" and the "steering column was damaged enough that it had to be replaced."

On October 10, 2014, Maria A.'s Nissan Maxima was stolen. When the car was found months later, it was "completely destroyed. Everything was off; the hood, the engine." In December 2014, Godofredo N.'s Toyota 4-Runner was stolen. The vehicle was found at Castro Point, but it was "completely destroyed." The frame had been "cut up" and the car was "in many pieces."

B. Castro Point Chop Shop

In December 2014, law enforcement officers, including Richmond Police Officer Joseph DeOrian, went to Castro Point, a former ferry depot at the base of the Richmond/San Rafael Bridge in Richmond. The officers found several people living there illegally, in makeshift shacks and campers. Law enforcement officers also saw numerous stolen vehicles "strewn around" the property, including a Toyota 4-Runner with a missing back hatch, and a Honda without a drive train and back-roof. A Subaru was "cut in half" and missing a drive train, and a Nissan with "doors removed, and "the drive train removed, [and] the front . . . cut off" was "buried in another pile of garbage." The vehicles were "run down," "beat up[,]" and "obviously cut upon." Cars had pieces "just sawed right off." There were boats "strewn about, some on trailers, some not, several jet skis around," a ski boat with altered registration numbers, and several trailer skids. There was "one way in and one way out" of Castro Point; to leave the property, one would have to pass the cut up vehicles. The sound of cars being chopped is "loud."

Officer DeOrian found a Toyota 4-Runner parked by the front entrance to the property, near a shack occupied by Anthony Rhodes.[2] Officer DeOrian arrested Daniel Breton. Breton admitted he cut up vehicles — including a 4-Runner and a Honda — for scrap metal money. Breton also said a man named "Moises" brought vehicles to Castro Point, cut off the catalytic converters, and left the vehicles for Breton to "cut into scrap." Breton knew the cars Moises brought to Castro Point were stolen.[3] Officer DeOrian interviewed Turcios, who admitted knowing Rhodes and going to Castro Point to "get high." When asked what he saw at Castro Point, Turcios was reluctant to talk and responded, "'nothing, really.'" Turcios claimed he did not know cars were scrapped at Castro Point but said he had stolen more than five cars and removed the batteries and stereos from those cars. Turcios also removed and sold "'a lot'" of catalytic converters from cars.

C. Breton's Trial Testimony

In early 2014, Breton was homeless and was "scrapping" — removing and selling metal from various objects. Sometimes Breton stole items to scrap. An acquaintance told Breton about a motor home at Castro Point; Breton went there to "check it out" and "started scrapping the motor home." Breton later stole a motor home, brought it to Castro Point, and began living in it. Several people lived at Castro Point, including Rhodes. Breton "squatt[ed]" at Castro Point for six to eight months before he was arrested in December 2014.

Breton stole vehicles and brought them to Castro Point. Others who lived at Castro Point, including Rhodes, had "visitors" who "would bring cars" to the property.

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[2] When Officer DeOrian returned to Castro Point the next day, the 4-Runner had been moved to the opposite end of the property, "buried in bushes and trees trying to be obscured."

[3] In December 2014, a security guard hired to patrol and clean up Castro Point went to the property and saw "chopped up" cars: they were "cut up into pieces . . . parts of cars, where they took . . . the doors off . . . , the rims and the tires, and then the rest was left there." There were also cut up boats, dismantled jet skis, and "mountains of garbage, piles of garbage." The area appeared to have been "taken over by homeless people."

Breton began "chopping up cars" in September 2014. He had "an idea" the cars brought to Castro Point were stolen; he knew "people weren't just bringing their own vehicles down there to get cut up or disposed of." It was common knowledge cars brought to Castro Point would be cut up. Breton used money from scrapping and chopping cars to buy drugs, which he shared with Turcios.

In the fall of 2014, Turcios came to Castro Point once or twice a week to "hang out" and smoke methamphetamine. Turcios brought two cars to Castro Point: a Toyota 4-Runner and a Subaru. Turcios sold the 4-Runner, and possibly the Subaru, to Rhodes. Before bringing the vehicles to Castro Point, Turcios removed and sold the car's catalytic converters.

Verdict and Sentence

The jury convicted Turcios of operating a chop shop (§ 10801), unlawfully driving or taking a vehicle (§ 10851, subd. (a)), and two counts of receiving a stolen motor vehicle (Pen. Code, § 496d). The probation report recommended Turcios pay various fines and fees, including a $176 probation report fee (Pen. Code, § 1203.1). The court sentenced Turcios to a five-year prison term, comprised of three years in county jail (Pen. Code, § 1170, subd. (h)(5)(B)) and two years on supervised release. As relevant here, the court imposed a $176 probation report fee, to which trial counsel did not object.

DISCUSSION

Turcios challenges his conviction for operating a chop shop in violation of section 10801 (the conviction), which makes it a crime to "knowingly and intentionally" own or operate a "chop shop." A chop shop is "any . . . premises where any person has been engaged in altering, destroying, disassembling, dismantling, reassembling, or storing any motor vehicle or motor vehicle part known to be illegally obtained by theft . . . in order to do either of the following: [¶] (a) Alter . . . the identity, including the vehicle identification number, of a motor vehicle or motor vehicle part, in order to misrepresent the identity of the motor vehicle or motor vehicle part, or to prevent the identification of the motor vehicle or motor vehicle part. [¶] (b) Sell or dispose of the motor vehicle or motor vehicle part." (§ 250.)

I.

CALCRIM No. 1752 Does Not Misstate the Law

Turcios claims the conviction must be reversed because CALCRIM No. 1752 "misstates the law." CALCRIM No. 1752 provides in relevant part: "The defendant is charged . . . with . . . operating a chop shop in violation of . . . section 10801." To prove the defendant is guilty of this crime, the People must establish: (1) the defendant knew he operated a chop shop; and (2) the defendant intentionally owned or operated the chop shop. CALCRIM No. 1752 defines a chop shop as "a building, lot, or other place where: [¶] 1. A person alters, destroys, takes apart, reassembles, or stores a motor vehicle or motor vehicle part; [¶] 2. That person knows that the vehicle or part has been obtained by theft, fraud, or conspiracy to defraud; AND [¶] 3. That person knows that the vehicle or part was obtained in order to either: [¶] a. Sell or dispose of the vehicle or part; OR [¶] b. Alter, counterfeit, deface, destroy, disguise, falsify, forge, obliterate, or remove the identity, including an identification number, of the vehicle or part, in order to misrepresent its identity or prevent its identification." (CALCRIM No. 1752 (Apr. 2016) p. 1123.)

Turcios claims the instruction is inconsistent with section 250, which defines a chop shop. We disagree. CALCRIM No. 1752 tracks the language of sections 250 and 10801, neither of which require the chop shop operator to have the intent to alter, destroy, or store illegally obtained vehicles or parts. A chop shop exists where "*any person*" is "engaged in altering, destroying . . . or storing . . . illegally obtained" motor vehicles or motor vehicle parts to, among other things, "sell or dispose of the motor vehicle or motor vehicle part. (§ 250, italics added; *People v. Ramirez* (2000) 79 Cal.App.4th 408, 415 (*Ramirez*) [defendant properly convicted of operating a chop shop where he lived in residence where chop shop operation was conducted and had been found in possession of registration papers for numerous cars].)

Furthermore — and when viewed in context — it is not reasonably likely the jury misunderstood or misapplied the intent element required to support a conviction for aiding and abetting the operation of a chop shop. "In reviewing any claim of

instructional error, we must consider the jury instructions as a whole, and not judge a single jury instruction in artificial isolation out of the context of the charge and the entire trial record." (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276.) During closing argument, defense counsel acknowledged Castro Point looked like "an automotive junkyard" and that the evidence suggested Turcios "likes to steal cars." Defense counsel claimed, however, Turcios did not aid and abet the chop shop's operation, and noted Turcios was not found with "a welding iron or a chain saw chopping up cars." The court instructed the jury on the principles of aiding and abetting (CALCRIM Nos. 400, 401) and, as discussed *infra*, the evidence strongly demonstrated Turcios aided and abetted the chop shop operation. Under the circumstances, there is not a reasonable likelihood the jury misconstrued or misapplied the law. (*People v. Dieguez, supra,* 89 Cal.App.4th at p. 276.)

II.

Substantial Evidence Supports the Conviction

Turcios contends insufficient evidence supports the conviction. He "bears an *enormous* burden" in establishing "insufficient evidence to sustain his conviction for operating a chop shop." (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330 (*Sanchez*), italics added.) This is so because "[o]ur review of any claim of insufficiency of the evidence is limited. '"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citations.]" [Citation.]' [Citations.]" (*Id.* at p. 329.) The same standard applies to convictions based on an aiding and abetting theory. '"'"Whether defendant aided and abetted the crime is a question of fact, and on appeal all conflicts in the evidence and reasonable inferences must be resolved in favor of the judgment."' [Citation.]" (*Ramirez, supra,* 79 Cal.App.4th at p. 414.)

Turcios cannot satisfy his "enormous burden," because ample evidence supports the conviction. (*Sanchez, supra,* 113 Cal.App.4th at p. 330.) First, Breton, Rhodes, and others were operating a chop shop at Castro Point. Second, the jury could reasonably infer Turcios knew the men operated a chop shop and that he intended to aid and abet that operation.[4] Turcios was friends with Breton and frequently visited Castro Point. The dismantled and "obviously cut upon" cars "strewn around" made it obvious Castro Point was a chop shop, and the layout of the property made it impossible for Turcios to visit without seeing cut up cars, or hearing the "loud" noise of cars being cut up. Turcios had significant experience stealing and dismantling cars, and selling parts from those cars. Turcios brought two stolen cars to Castro Point, and sold one car to Rhodes. Breton told Officer DeOrian that Turcios brought vehicles to Castro Point to be "cut into scrap." Together, this evidence establishes Turcios aided and abetted the operation of a chop shop at Castro Point. (*Sanchez, supra,* 113 Cal.App.4th at p. 331 [sufficient evidence supported "the view that defendant was operating a chop shop"]; *Ramirez, supra,* 79 Cal.App.4th at p. 415 [sufficient evidence supported chop shop conviction on aiding and abetting theory].)

Turcios claims insufficient evidence supports the conviction because there is no evidence Rhodes intended to chop the two vehicles Turcios brought to Castro Point. We are not persuaded. On the evidence described above, the jury could reasonably infer Breton, Rhodes, and others operated a chop shop at Castro Point and Turcios aided and abetted that operation. Turcios's alternate interpretation of the evidence does not demonstrate a lack of substantial evidence supporting the conviction.

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[4] "'[A]n aider and abettor is a person who, "acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime."' [Citation.]" (*People v. Jurado* (2006) 38 Cal.4th 72, 136.)

III.

The Prosecution Did Not Urge a Conviction on a "Legally Inadequate Theory"

Turcios claims the prosecutor urged the jury to convict him of violating section 10801 "on a legally inadequate theory[.]" As stated above, the prosecution theory was Turcios aided and abetted the operation of a chop shop. At one point during her closing argument, the prosecutor stated: "So, we talked about this a little bit in opening. But what is a chop shop? It doesn't have to be a formal building. It doesn't have to have an open sign. It doesn't have to have a structure. It could be any building. It could be any lot. It could be any premise. It could be any one of those three where a person is altering, destroying, taking apart, reassembling — this one is important — or storing a motor vehicle.

"If you steal a vehicle and you take it to a location and just store it there, with the intent so that it doesn't get caught by law enforcement, under the law that's running a chop shop. And that person knows that the vehicle or part of the vehicle has been attained by theft, and it was obtained in order to do one of two things; to sell, or dispose, chop up, get rid of, make disappear, or to alter, counterfeit, deface, destroy, disguise, falsify, forge or remove the identity of the vehicle or part in order to misrepresent the identity or prevent its identification. [¶] Changing out the backs of the cars, switching out the wheels of cars, switching out the ignitions of cars. Those are all things that fit squarely within this area of the law."

According to Turcios, the prosecutor's comments urged the jury to convict him "on the impermissible theory" that he could violate section 10801 by "storing a vehicle at Castro Point with the intent to avoid detection[.]" "'When the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand.'" (*People v. Guiton* (1993) 4 Cal.4th 1116, 1122, quoting *People v. Green* (1980) 27 Cal.3d 1, 69, overruled on different grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 239.)

Here, the prosecutor did not present a legally erroneous theory of the case. Section 250 defines a chop shop as including a place where "any person" has "engaged in . . . storing any motor vehicle or motor vehicle part known to be illegally obtained by theft" in an attempt to hide its identity, prevent its identification, or sell or dispose of the motor vehicle. (§ 250, subds. (a), (b).) The prosecutor's description of a chop shop was consistent with section 250.[5] In any event, we discern no prejudice from the prosecutor's passing comment on the definition of a chop shop because the evidence overwhelmingly demonstrated Turcios aided and abetted the chop shop operation by bringing stolen cars to Castro Point for Breton and others to "cut into scrap."

IV.

Any Failure to Instruct the Jury on Possessing Stolen Property Was Harmless Error

Turcios contends the conviction must be reversed because the court failed to instruct the jury on the lesser included offense of possessing stolen property in violation of Penal Code section 496.

We assume for the sake of argument possessing stolen property is a lesser included offense of operating a chop shop and the court erred by failing to instruct on that lesser included offense. (Compare *Sanchez*, *supra*, 113 Cal.App.4th at pp. 332-333 [receiving stolen property is a lesser included offense of operating a chop shop]; *People v. Strohman* (2000) 84 Cal.App.4th 1313 [not a lesser included offense].) The court's error, however, was harmless. "The erroneous failure to instruct on a lesser included offense generally is subject to harmless error review. . . . Reversal is required only if it is reasonably probable the jury would have returned a different verdict absent the error[.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 867-868.) "In determining whether a failure to

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[5] *People v. Morgan* (2007) 42 Cal.4th 593 does not assist Turcios. In that case, the jury instruction and the prosecutor's closing argument "presented a legally inadequate theory" regarding the asportation element of kidnapping. (*Id.* at p. 611.) Here, CALCRIM No. 1752, was proper and the prosecutor accurately defined a chop shop in accordance with section 250.

instruct on a lesser included offense was prejudicial, an appellate court may consider 'whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.' [Citations.]" (*Id.* at p. 870.)

Here, the court's failure to instruct on the lesser included offense of receiving stolen property was not prejudicial. (*People v. Rogers, supra,* 39 Cal.4th at p. 870.) That the 4-Runner Turcios brought to Castro Point was not chopped does not make it reasonably probable the jury would have convicted him of possessing stolen property. The jury could have easily inferred Turcios stole the 4-Runner and brought it to Castro Point to sell it, hide its identity, or dispose of it. And, as discussed above, the evidence that Turcios aided and abetted the operation of a chop shop was overwhelming.

V.

Turcios's Ineffective Assistance of Counsel Claim Fails

As stated above, the court imposed a probation report fee of $176 pursuant to Penal Code section 1203.1.[6] Trial counsel did not object. A defendant's failure to object to the imposition of the probation report fee forfeits the ability-to-pay issue on appeal. (See *Trujillo, supra,* 60 Cal.4th at pp. 858-859.) Turcios contends trial counsel rendered ineffective assistance by failing to object to the imposition of the probation report fee. According to Turcios, a reasonably competent attorney would have objected because Turcios did not have the ability to pay and, as a result, the fee "would not have been imposed had counsel objected."

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[6] Under Penal Code section 1203.1b, "when a defendant is convicted and granted probation or a conditional sentence, and has been the subject of any . . . presentence investigation and report, the probation officer . . . must make a determination of the defendant's ability to pay all or a portion of the reasonable cost of probation supervision and the preparation of the presentence report. [Citation.]" (*People v. Trujillo* (2015) 60 Cal.4th 850, 855 (*Trujillo*).) A defendant is entitled to a hearing on his ability to pay, but may waive that right. (Pen. Code, § 1203.1b, subd. (a).)

To demonstrate ineffective assistance of trial counsel, Turcios must show counsel's representation fell below prevailing professional norms and he was prejudiced by that deficiency. (*Strickland v. Washington* (1984) 466 U.S. 688, 694.) Assuming for the sake of argument trial counsel's failure to object constituted inadequate representation, Turcios cannot establish prejudice. (*Ibid*.) As Turcios acknowledges, he is entitled to challenge his ability to pay the fee when "he is on supervised release." Our high court has held a "defendant who by forfeiture of a hearing is precluded from raising on appeal the issue of ability to pay probation-related fees is not wholly without recourse. . . . '[t]he court may hold additional hearings during the probationary, conditional sentence, or mandatory supervision period to review the defendant's financial ability to pay . . . . Likewise, during the pendency of the judgment rendered under section 1203.1b, the defendant 'may petition the probation officer for a review of [his or her] financial ability to pay or the rendering court to modify or vacate its previous judgment on the grounds of a change of circumstances with regard to the defendant's ability to pay the judgment.' [Citation.] The sentencing court as well as the probation officer thus retains jurisdiction to address ability to pay issues throughout the probationary period." (*Trujillo, supra,* 60 Cal.4th at pp. 860-861.)

Because Turcios may challenge his ability to pay the probation fee when he is on supervised release, he cannot establish prejudice from trial counsel's failure to object to the imposition of the fee at the sentencing hearing. Accordingly, we reject Turcios's claim of ineffective assistance of trial counsel.

DISPOSITION

The judgment is affirmed.

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Jones, P.J.

We concur:

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Needham, J.

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Bruiniers, J.